Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–11 OF 1997(P)
WAN ADNAN CJ (MALAYA), MOHAMED DZAIDDIN AND AHMAD FAIRUZ FCJJ
10 SEPTEMBER 2001

Labour Law *— Employment — Absenteeism — Failure of employee to report for duty on demoted position — Whether representation by employee to Director General made within time — When did time begin to run under s 20(1) of Industrial Relations Act 1967*

Labour Law *— Employment — Dismissal — Whether notification by employer to employee that his service had been terminated due to failure to turn up for work amounted to dismissal within meaning of s 20(1) of Industrial Relations Act 1967*

The respondent was the general manager of the appellant's office in Pulau Pinang. A domestic inquiry found the respondent guilty of certain charges preferred against him and he was then demoted. The respondent was asked to report for work on the demoted rank on 3 May 1989 but the respondent failed to do so. On 12 May 1989, the appellant wrote to the respondent and requested him to report for duty in his reduced rank. In his reply of 17 May 1989, the respondent stated his reasons for refusing to report for work. Thereafter, on 24 May 1989, the appellant wrote to the respondent giving him seven days to state in writing whether or not he was prepared to abide by the domestic inquiry's decision. The respondent did not reply and on 6 June 1989, the appellant terminated the respondent's employment. On 20 July 1989, the respondent made representations to the Director General of Industrial Relations contending that he had been dismissed without just cause or excuse. Unable to resolve the dispute, the respondent's representations were referred to the Minister of Human Resources who then referred the matter to the Industrial Court. The Industrial Court held that the respondent had been dismissed without just cause or excuse. In its award, the Industrial Court found that the respondent had been summarily terminated for the misconduct of failing to report for duty to a demoted position and the appellant did not conduct any disciplinary proceedings in respect of that misconduct. The appellant then applied to the High Court at Penang for an order of certiorari to quash the award of the Industrial Court. The High Court allowed the appellant's application (see [1994] 3 MLJ 808). The High Court held that the appellant was justified in dismissing the respondent as otherwise, an employee could just stay away from work to win his demand, whether valid or otherwise and at the same time prevent the employer from taking any action without being accused of having dismissed the employee. The High Court further held that the appellant's failure to conduct an inquiry into the respondent's misconduct in not reporting for work was not fatal. The respondent then appealed to the Court of Appeal, which allowed the

appeal (see [1996] 3 MLJ 137). Dissatisfied with the decision, the appellant applied to this court for leave to appeal and leave was granted. In the order granting the leave, the questions to be considered by this court were: (a) when did time begin to run under s 20(1) of the Industrial Relations Act 1967 ('IRA') where there had been an abandonment of work by the employee; and (b) whether it was 'dismissal' within the meaning of s 20(1) of the IRA where the employer notified the employee that his service was terminated because he had failed to turn up for work.

Held, allowing the appeal:

(1) The respondent's misconduct entitled the appellant to dismiss him at common law and the appellant terminated the contract when the appellant elected to dismiss the respondent. Therefore, the termination by the appellant was a dismissal within the meaning of s 20(1) of the IRA. The termination letter was dated 6 June 1989 and as such, time under s 20(1) of the IRA began to run from 6 June 1989. Consequently, the respondent's representation to the Director General, which was made on 21 July 1989, was within time (see pp 61I–62B).

(2) The Industrial Court had failed to consider the point that no employee could claim as a matter of right, leave of absence without permission and that remaining absent without any permission was gross violation of discipline, which constituted misconduct justifying the discharge of a workman from service. In the circumstance, the Industrial Court had committed an error of law and its findings were 'so devoid of any plausible justification that no reasonable body of persons could have reached them'. Therefore, the respondent's dismissal was with just cause and excuse and there was no alternative except to confirm the orders made by the High Court (see pp 61H, 63A, 64G–H); *London Transport Executive v Clarke* [1981] ICR 355; *Malayan Banking Bhd v Association of Bank Officers Peninsular Malaysia and Industrial Court* [1988] 3 MLJ 204 and *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

[Bahasa Malaysia summary

Responden merupakan pengurus besar pejabat perayu di Pulau Pinang. Satu siasatan domestik mendapati responden bersalah atas tuduhan-tuduhan tertentu yang dibuat terhadap beliau dan beliau telah diturunkan pangkat. Responden telah diminta melaporkan diri untuk bekerja menurut pangkat yang telah diturunkan itu pada 3 Mei 1989 tetapi responden telah gagal berbuat sedemikian. Pada 12 Mei 1989, perayu telah menulis kepada responden dan meminta supaya beliau melaporkan diri untuk bertugas dengan pangkat yang telah diturunkan itu. Di dalam jawapannya bertarikh 17 Mei 1989, responden menyatakan alasan-alasannya kerana enggan melaporkan

diri untuk bekerja. Selepas itu, pada 24 Mei 1989, perayu telah menulis kepada responden dengan memberikan beliau tempoh masa selama tujuh hari untuk menyatakan secara bertulis sama ada beliau bersedia untuk mematuhi keputusan siasatan domestik tersebut atau pun tidak. Responden tidak menjawab dan pada 6 Jun 1989, perayu telah menamatkan pekerjaan responden. Pada 20 Julai 1989, responden telah membuat representasi-representasi kepada Ketua Pengarah Perhubungan Perindustrian menegaskan bahawa beliau telah dipecat tanpa alasan atau sebab yang adil. Oleh kerana tidak dapat menyelesaikan pertikaian tersebut, representasi-representasi responden telah dirujukkan kepada Menteri Sumber Manusia yang telah kemudiannya merujuk perkara tersebut kepada Mahkamah Perusahaan. Mahkamah Perusahaan telah memutuskan bahawa responden telah dipecat tanpa alasan atau sebab yang adil. Dalam awardnya, Mahkamah Perusahaan memutuskan bahawa responden telah diberhentikan secara terus kerana salah-laku gagal melaporkan diri untuk bertugas di jawatan yang lebih rendah dan perayu tidak melakukan sebarang prosiding tatatertib berhubung salah laku itu. Perayu kemudiannya memohon kepada Mahkamah Tinggi di Pulau Pinang untuk mendapatkan perintah certiorari bagi membatalkan award Mahkamah Perusahaan itu. Mahkamah Tinggi telah membenarkan permohonan perayu (lihat [1994] 3 MLJ 808). Mahkamah Tinggi telah memutuskan bahawa tindakan perayu memecat responden adalah wajar kerana jika tidak, seseorang kakitangan boleh mengambil tindakan tidak hadir untuk bekerja demi untuk mendapat apa yang dituntut, sama ada ianya sah atau sebaliknya dan pada masa yang sama menghalang majikan daripada mengambil sebarang tindakan tanpa dituduh telah memecat pekerja tersebut. Mahkamah Tinggi selanjutnya memutuskan bahawa kegagalan perayu untuk menjalankan satu siasatan terhadap salah laku responden kerana tidak melaporkan diri untuk bekerja adalah tidak memudaratkan. Responden kemudiannya merayu kepada Mahkamah Rayuan, yang telah membenarkan rayuan tersebut (lihat [1996] 3 MLJ 137). Oleh kerana tidak berpuashati dengan keputusan itu, perayu telah memohon kepada mahkamah ini bagi mendapatkan kebenaran untuk merayu dan kebenaran telah diberikan. Dalam perintah yang memberikan kebenaran tersebut, persoalan-persoalan yang harus dipertimbangkan oleh mahkamah ini adalah: (a) bilakah masa bermula di bawah s 20(1) Akta Perhubungan Perindustrian 1967 ('IRA') di mana berlakunya penghentian kerja oleh pekerja tersebut; dan (b) sama ada terdapat 'pemecatan' di dalam lingkungan maksud s 20(1) IRA apabila majikan telah memberitahu pekerja tersebut bahawa perkhidmatannya ditamatkan kerana beliau telah gagal hadir untuk bekerja.

Diputuskan, membenarkan rayuan tersebut:

(1) Perbuatan salah laku responden telah memberikan perayu hak untuk memecat beliau menurut common law dan perayu telah menamatkan kontrak apabila perayu memilih untuk memecat

responden. Oleh itu, penamatan oleh perayu merupakan suatu pemecatan di dalam lingkungan maksud s 20(1) IRA tersebut. Surat penamatan tersebut bertarikh 6 Jun 1989 dan oleh yang demikian, di bawah s 20(1) IRA masa bermula daripada 6 Jun 1989. Akibatnya, representasi responden kepada Ketua Pengarah, yang telah dibuat pada 21 Julai 1989, adalah di dalam lingkungan masa (lihat ms 61I–62B).

(2) Mahkamah Perusahaan telah gagal untuk mempertimbangkan perkara bahawa tiada pekerja boleh menuntut mengikut hak, kebenaran untuk tidak hadir tanpa kebenaran dan bahawa kekal tidak hadir tanpa sebarang kebenaran merupakan perlanggaran tatatertib yang keterlaluan, yang mana membentuk suatu perbuatan salah laku yang mewajarkan seseorang pekerja itu diberhentikan daripada perkhidmatannya. Dalam keadaan tersebut, Mahkamah Perusahaan telah melakukan satu kesilapan undang-undang dan keputusannya adalah 'so devoid of any plausible justification that no reasonable body of persons could have reached them'. Oleh itu, pemecatan responden adalah dengan alasan dan sebab yang adil dan tidak terdapat sebarang alternatif melainkan mengesahkan perintah-perintah yang dibuat oleh Mahkamah Tinggi (lihat ms 61H, 63A, 64G–H); *London Transport Executive v Clarke* [1981] ICR 355, *Malayan Banking Bhd v Association of Bank Officers Peninsular Malaysia and Industrial Court* [1988] 3 MLJ 204 dan *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.]

Notes

For cases on absenteeism, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 741–745.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 813–832.

Cases referred to

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)

Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (refd)

London Transport Executive v Clarke [1981] ICR 355 (folld)

Malayan Banking Bhd v Association of Bank Officers Peninsular Malaysia and Industrial Court [1988] 3 MLJ 204 (folld)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (folld)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20(1), 20(1A)

Protection of Employment Act 1978 [UK] s 55(2)

Appeal from: Civil Appeal No P–02–110 of 1994 (Court of Appeal, Kuala Lumpur)

P Mithran (*Dass Jainab & Associates*) for the appellant.
N Shanmugam (*Shan & Gooi*) for the respondent.

Ahmad Fairuz FCJ (delivering judgment of the court): The respondent was the General Manager of the appellant's office in Penang when he was suspended by the appellant pending investigations into allegations against him. A domestic inquiry found the respondent guilty of eight of them. The appellant, however, did not dismiss the respondent. Instead, the respondent was told to report for work on a demoted rank. He protested. An exchange of correspondence ensued between respondent and appellant. In the meantime, the respondent absented himself from work for a period of 35 days. Consequently, the appellant terminated his employment with the appellant. The respondent then made representations to the Director General of Industrial Relations. He contended that he had been dismissed without just cause or excuse. Unable to resolve the dispute, the respondent's representations were referred to the Minister who then referred the matter to the Industrial Court which held that the respondent had been dismissed without just cause or excuse. The appellant then moved the High Court at Penang for certiorari. This was granted by the court. The respondent then appealed to the Court of Appeal which allowed the appeal. Dissatisfied with the decision, the appellant applied to this court for leave to appeal and leave was granted. According to the order granting the leave, the following two questions were posed for the determination of this court:

(a) when does time begin to run under s 20(1) of the Industrial Relations Act 1967, where there has been an abandonment of employment, it being a common fact that the employee had failed to turn up for work for 6–7 weeks after his demotion;

(b) is it 'dismissal' within the meaning of s 20(1) of the Industrial Relation Act 1967, where the employer notifies the employee that his service is terminated because he had failed to turn up for work — is it 'termination' by the employer or repudiation of contract of employment by the employee.

As to question (a) posed in para (1) above, the learned counsel for the appellant submitted that the respondent's failure to attend work from 3 May 1989 until 6 June 1989 can be treated as if the respondent had considered himself to have been dismissed and time for purposes of s 20(1A) Industrial Relations Act 1967 ('the IRA') began to run from 3 May 1989. Section 20(1A) of the IRA reads:

> The Director General shall not entertain any representations under sub-s (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

And as the respondent's representation to the Director General was received on 21 July 1989, there is an interval of about 80 days. Thus, the appellant argued, the respondent was out of time when he made the representation. Alternatively, the appellant submitted that the respondent had notice of his demotion a day or two after 12 May 1989, ie at the latest by 14 May 1989. This is because the letter from the appellant to the respondent dated 12 May 1989 categorically made mention of the respondent's new position as 'Manager (General Affairs)'. It was argued that if 14 May 1989 is taken as the dismissal date, then the representation was received 7 days late. In the circumstances the appellant contended that there was a violation of an express statutory provision and as such the Industrial Court has no jurisdiction to consider the respondent's representation.

The respondent, on the other hand, contended that the dismissal took place on 6 June 1989. This is because the dismissal letter is dated 6 June 1989. The respondent's representation was received on 21 July 1989. The respondent therefore had taken about 45 days calculated from 6 June 1989 to file his representation. Hence the respondent was well within the time limit set under s 20(1A) of the IRA.

As to the appellant's alternative argument on the date in issue being 12 May 1989 or 14 May 1989, the respondent urged us to consider 24 May 1989 as the material date. This is because the appellant had on that date written to the respondent stating among other things the following:

> 3 In respect of the fourth paragraph of your said letter, kindly confirm in writing within seven (7) days from the date hereof whether you will abide by the Company's decision arising from the domestic inquiry held recently, failing which the Company shall have no alternative but to deem that you are no longer interested in the employment with the Company.

It was further submitted that the respondent had in fact at the hearing before the Industrial Court said that he considered himself to have been dismissed by this letter of 24 May 1989. It was argued that if this date is accepted then the respondent had made his representation within time.

On this issue, the Court of Appeal said:

> ... The answer to that question must surely be from the moment the workman considers himself to have been dismissed without just cause or excuse. Not a moment sooner. An objective assessment of the facts of a particular case will disclose the point of time at which the workman had, by words or by conduct, considered himself as dismissed. One may then be able to say when the sixty day period fixed by sub-s (1A) began.
>
> So, it all depends on the facts of each case:
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> Take the case of demotions. A workman in a particular case who suffers a demotion may consider himself to have been dismissed without just cause or excuse. He may treat the demotion as a dismissal. Once he does that, then, he has sixty days from that date to make his representations.

The Court of Appeal then proceeded to summarize the facts of the case. We need only mention the following facts at this juncture:

(a) On 2 May 1989, the appellant wrote to the respondent informing him that the domestic inquiry had found the charges against him to be proven. As such, the respondent had been reduced, in rank and was asked to report for duty on 3 May 1989. The respondent, however, did not report for work.

(b) On 12 May 1989, the appellant wrote requesting the respondent to report for duty in his reduced rank. In his reply of 17 May 1989, the respondent stated his reasons for refusing to report for work.

(c) On 24 May 1989, the appellant wrote to the respondent 'giving him seven days to state in writing whether he is prepared to abide by the domestic inquiry's decision'. The appellant also stated in that letter that if there was no response from the respondent, the appellant would assume that the respondent was 'no longer interested in his employment with' the appellant.

(d) On 6 June 1989, the appellant wrote to the respondent 'terminating his services on the ground that he is no longer interested in his employment'.

(e) On 20 July 1989, the respondent made representations to the Director General.

After considering, amongst other things, the abovementioned facts, the Court of Appeal said that it was quite obvious that the respondent did not treat the demotion in rank as amounting to a dismissal. The Court of Appeal then stressed that the Minister referred to the Industrial Court the issue of the alleged dismissal of the respondent on 6 June 1989. This is because, according to the Court of Appeal, the respondent had not until 6 June 1989, considered himself as having been dismissed without just cause or excuse. The Court of Appeal then held:

> On the facts of this case, it is beyond question that the 60 day time frame did not commence from the date of the demotion — which was never challenged — but from the date of the impugned termination. It follows that the representations were made within the prescribed time limit. The Industrial Court was accordingly not without jurisdiction to entertain the reference.

The Court of Appeal then quoted *in extenso* the part of the High Court's judgment dealing with this issue of time limit under s 20(1A). What is clear from the quoted judgment is the fact that the learned High Court judge said:

> ... It cannot be disputed that as soon as the respondent was notified of his demoted position, the relief of constructive dismissal was available to him under the Act, and he did not avail himself by seeking that relief within the 60-day period in which to make the representation under s 20(1A) of the Act. ... In this regard, it was also submitted ... that the calculation of the 60-day period should run from the letter dated 24 May 1989 ... which, if so, would bring the respondent's representation to the Director-General to within the 60-day period. I disagree, as it stands to reason that a representation, being in essence a serious industrial complaint, ought rightly to be made as soon as an employee first had official notice of the employer's act which is the essence of his complaint and which he seeks to impugn. In the current case, this would be when the respondent received the letter dated 2 May 1989 from the

> applicant company requesting him to report for duty on the demoted position of Manager, (General Affairs) on 3 May 1989; and at the very latest it should be when the reminder dated 12 May 1989 was written to him. On the facts and the admitted chronology of events, I hold that the respondent was clearly out of time under s 20(1A) of the Act to make his claim for constructive dismissal and it was not before the Industrial Court to make any finding on the matter and neither was it referred to it by the Minister.

On this part of the judgment, the Court of Appeal said that the learned High Court judge had 'treated the time postulate under the Act as being inextricably intertwined with the demotion'. Hence, the learned High Court judge had held that the sixty-day period was to have commenced from the date when the respondent was notified of his demotion. To the Court of Appeal, the learned judge appeared to have proceeded on the basis that the respondent was obliged to treat his demotion as amounting to a dismissal. Thus, the High Court, according to the Court of Appeal, 'was clearly wrong'. The Court of Appeal was of the view that the respondent did not consider himself dismissed at the time of the demotion. The respondent had allowed the appellant to reconsider its decision. The Court of Appeal was of the view that the respondent 'was arguing with his employer ... that he ought to suffer no demotion'.

As to the common fact of the respondent failing to turn up for work for 35 days after his demotion, the learned High Court judge, in his judgment stated:

> It is settled law that ... an employee who leaves his work will be held to have resigned and there will be no dismissal within the meaning of the employment legislation at all.

The learned judge then quoted the following words from the speech of Lord Denning MR in the case of *London Transport Executive v Clarke* [1981] ICR 355 at p 365 ('*Clarke*'):

> ... I would ask this question: can an employee take off — go absent without leave for six months and on returning say to his employer, 'You have not dismissed me. I want my job back.' If the employer refuses to take him back, can the man say, 'By your refusal you have dismissed me. Now I claim for unfair dismissal.' Surely in such a case, by taking off for six months without leave, *the man has dismissed himself.* If this be correct when he takes off for six months, it should also be for two months, or as here, for seven weeks. The reason is because it is completely inconsistent with the continuance of his contract that he should take so long a time off. In some cases the employer will have replaced him by some other man or have got his work done by others. In other cases, he may have left his work undone. But whatever it is, the employer cannot reasonably be expected to take him back. *The man will himself have terminated his contract of employment.* (emphasis added)

After setting out the duties of the Industrial Court under s 20 IRA, the learned judge, at p 24 of his judgment (p 100 of the appeal record) said:

> In the matter before me, after the respondent was found guilty of several charges against him, and the Board of Inquiry's recommendation that he be demoted to the position of Manager (General Affairs) was implemented vide the letter dated 2 May 1989 to him, the respondent had the option at that

point in time of his receipt of the letter dated 2 May 1989, to refer the matter to the Director General, since he was unhappy about the composition of the panel of inquiry resulting in his demotion. Instead, he stayed away from work. The act of being absent is itself a misconduct on the part of the respondent. ... Indeed, it is the act of the respondent by staying away from work, which evinces an intention of not wanting to continue his employment with the applicant thereby repudiating the Contract of Employment. This being so, the letter of the applicant dated 6 June 1989 ought to be taken as an acceptance of the repudiation and/or a termination of the Contract of Employment, when considered in the light of the London Transport Executive case. ... *Thus, I held* that the applicant company did not dismiss the respondent, who by his failure to report to work had dismissed himself, and the question of whether 'dismissal was without just cause or excuse by his employer' did not arise'. (Emphasis added.)

The Court of Appeal, in reference to the speech of Lord Denning that was quoted by the learned judge in his judgment, said:

There are three comments we would make upon the view expressed by Lord Denning in the foregoing passage.

First, the United Kingdom legislation under which *Clarke* was decided differs from the Act in material respects. The Supreme Court in *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92 recognized this and said so. We must therefore be very careful when we refer to English cases in this area of the law. We must on no account be swayed by them when interpreting s 20(1) of the Act.

Second, while the ordinary principles of common law relating to the discharge of a contract of service by repudiation and acceptance may continue to apply under the United Kingdom statute, they are wholly irrelevant to a case under s 20(1) of the Act. Industrial adjudication is not concerned with the technicalities that form part and parcel of the common law doctrine of repudiation. Indeed, s 30(5) of the Act expressly declares that the Industrial Court

> 'shall act accordingly to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.'

... This brings us again to the decision in *Wong Chee Hong v Cathay Organization (M) Sdn Bhd*, in particular, to the passage in the judgment of Salleh Abas LP, which we have reproduced earlier. The learned Lord President there said that the word 'dismissal' in s 20 of the Act must be interpreted according to its meaning in common law. He referred to *Bouzourou v The Ottoman Bank* [1930] AC 271, which was a case of wrongful dismissal at common law. But we are not here dealing with a case at common law. And it is noteworthy that in a later decision, the Privy Council has recognized the wider scope of industrial adjudication to cover cases where an employer has done no more than exercise his legal rights. See *United Engineering Workers Union v Devanayagam* [1967] 2 All ER 367, per Viscount Dilhorne at p 371.

This court has, in *Hong Leong Equipment Sdn Bhd & Anor v Liew Fook Chuan* [1996] 1 MLJ 481, held that the very purpose for which Parliament passed the Act and the several amendments thereto was to mitigate the rigours of the common law and the doctrines of equity in their application to the relationship between an employer and his workman. It is therefore too late in the day to try and interpret the Act to keep it in line with the common law

doctrines that apply to a breach of contract. It follows that the remarks of Lord Denning in *Clarke* have no application to a case under the Act.

Thirdly, it is noteworthy that although Lord Denning concurred in the final result, his views formed the minority view. The other two members of the English Court of Appeal (Templeman and Dunn LJJ) differed from the Master of the Rolls when it came to the reasons for allowing the appeal. The learned judge in the present case unfortunately failed to notice this important matter. In any event, later English cases have refused to apply the theory of 'self-dismissal' propounded by Lord Denning in *Clarke*. See *Pendlebury v Christian Schools North West Ltd* [1985] ICR 174.

At p 33 of its judgment, the Court of Appeal concluded that the learned High Court judge had wrongly relied 'on the common law principles governing the repudiation of a contract and his acceptance of the so-called doctrine of self-dismissal stated by Lord Denning in Clarke' when he quashed the Industrial Court's award.

In *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92, the Supreme Court pointed out that s 20 IRA is entirely different from para (c) of s 55(2) of the United Kingdom Protection of Employment Act 1978. Hence the Supreme Court, at p 95 of the report, said:

> ... Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word 'dismissal' in our s 20. *We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle.* Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed (see *Bouzourou v The Ottoman Bank* and *Donovan v Invicta Airways Ltd*).
>
> In *Bouzourou*'s case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan*'s case, the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal. (Emphasis added.)

And earlier on, at p 93 of the report, the Supreme Court said:

> The case, we were told, raises an important question of law as to whether or not the doctrine of constructive dismissal is applicable in the interpretation of s 20 of our Industrial Relations Act 1967.

And the appeal now before us, as in *Wong Chee Hong*, is one that pertains to s 20 IRA. As such we see nothing wrong in applying the common law principles to the issue of dismissal in the appeal now before us. That is what, after all, the Supreme Court did in *Wong Chee Hong*.

As to the common law principles, Lord Denning MR in *Clarke*, at p 362 of the report, said:

> It is over 50 years ago now that I studied in depth the common law relating to the discharge of contract by breach or by incapacity or by repudiation. The result is to be found in *Smith's Leading Cases* (13th Ed, 1929), Vol II, pp 46–56. I adhere to what I then said. ... But a *repudiatory breach is better described as a 'fundamental breach' or a 'breach going to the root of the contract'. Such a breach may well lead to the discharge of a contract without any need for acceptance.* The classic instance is where a singer genuinely fell ill and could not attend the rehearsals. Her incapacity discharged the theatre from further performance, without any talk of acceptance. It would be just the same if she had not really been ill but had pretended to be ill and thus been guilty of a breach going to the root of the contract. Again the contract would be discharged without any talk of acceptance. (Emphasis added.)

At p 363 of the report, Lord Denning referred to one group of cases wherein:

> ... the misconduct of the employee is such that it is completely inconsistent with the continuance of the contract of employment. So much so that the ordinary member of the tribunal would say of him: 'He sacked himself.' In these cases it is the employee himself who terminates the contract. *His misconduct itself is such as to evince an intention himself to bring the contract to an end.* Such as when an employee leaves and gets another job, or when he absconds with money from the till, or goes off indefinitely without a word to his employer. If he comes back and asks for his job back, the employer can properly reply: 'I cannot have you back now.' There is no election in that case. The man dismisses himself. In the words of Shaw LJ in *Gunton v Richmond-upon-Thames London Borough Council* (1980) ICR 755, at p 763, there is a 'complete and intended withdrawal of his service by the employee'. (Emphasis added.)

In the appeal before us, the evidence, as pointed out by the Court of Appeal, do not go to support an intention on the part of the respondent to bring his contract to an end. As said by the Court of Appeal in its judgment, the respondent, in a series of correspondence between him and the appellant, was arguing with the appellant that he ought to suffer no demotion. (The respondent's letter of 27 May 1989 to the appellant referred to by the Industrial Court in its award supports this view of the Court of Appeal.) As such the respondent's misconduct cannot be one which is sufficient to discharge his contract without any need for acceptance. Hence time cannot run from 3 May 1989, the date when the respondent began to absent himself from work. At this juncture, we find it useful to again refer to p 363 of the report of *Clarke* wherein Lord Denning said:

> Under our modern legislation a new question arises. It arises under s 54 of the Employment Protection (Consolidation) Act 1978, re-enacting earlier sections going back to 1971. When an employee is dismissed for misconduct, we have to ask — and to answer — the question: *who 'terminates' the contract?* If the employer terminates it, it is taken to be unfair unless the employer proves that it was fair. But, if the employee terminates it by his own misconduct, he gets nothing.
>
> *Much difference of opinion* has been evoked *amongst the judges on that question* under the Act. So much so that *I feel it is desirable for this court to afford some guidance. I think it is best done by applying the common law principles* which I have just stated. The cases fall into two groups ...

> ... The second group is where *the misconduct* of the employee *is bad enough to justify the employer at common law in dismissing him, but leaves it open to the employer whether to dismiss him for it or not.* His misconduct is such as to show that he is not going to fulfil his duties as he ought to do: but nevertheless it is not such as to be entirely disruptive of the contract. He does not sack himself, but he is guilty of a breach which entitles the employer at common law to dismiss him. *If the employer does elect to dismiss him, it is the employer who terminates the contracts.* (Emphasis added.)

Dunston Ayadurai, in his book, *Industrial Relations in Malaysia — Law and Practice* (2nd Ed) at p 168, has this to say on 'termination and dismissal':

> The term 'termination' in industrial law really refers to the termination of the employment relationship, but as this relationship is a contractual one here, it is usually identified with the termination of the employment contract. The contract may be terminated by the employer (when he retrenches, for example) or by the employee (for instance, when he resigns) or even by an event (such as age or death). There may be any number of reasons for its termination. However, *where the contract is terminated by the employer because of the perceived misconduct* of the employee, then — whatever the reason given by the employer for the termination of the employee — *the termination is termed a 'dismissal'. ... Nevertheless, whether simply a termination or a dismissal for misconduct, the effect is the same, viz the termination of the contract.* (Emphasis added.)

The learned Chang Min Tat FCJ, when delivering the judgment of the Federal Court in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, at p 312, said:

> ... It further follows that on a proper interpretation of the relevant sections of the Act, *there is no material distinction between dismissal and termination. Either must be with just cause or excuse to be justifiable*; otherwise the Industrial Court may make an award ... (Emphasis added.)

We had shown, earlier on, that the respondent's misconduct was one that did not evince an intention on the part of the respondent to bring his contract to an end. What is clear from the evidence tendered before the Industrial Court is a misconduct which obviously show that the respondent, in the words of Lord Denning in *Clarke*, 'is not going to fulfil his duties as he ought to do'. It is to be noted that the demotion was made, unlike in the case of *Wong Chee Hong*, after a domestic inquiry was duly held. The respondent was notified to report for duty on the demoted position. And he never did. In his letter of 27 May 1989 addressed to the appellant, the respondent, inter alia, said:

> With reference to your letter dated 2 May 1989 wherein you inform me that I am demoted from my position of General Manager to Manager (General Affairs) with a much reduced salary and the withdrawal of my existing benefits, I am to inform you I cannot accept your arbitrary decision, for if I do, it would appear that I accept my guilt, which in actual situation I am NOT guilty of any allegation made against me by the newly appointed Senior General Manager of PanGlobal Textile Bhd, Mr Tan Kai Swee. There is absolutely no justification on your part to demote me when there is no proof at all of any guilt on my part. ... I am sad to say that you took action without proof of any wrong doing on my part. ...

> ... I am also to inform you that at the very beginning of the Inquiry, I had raised objections to the composition of the Panel Members, but on account of your assurance in your letter dated 15 February 1989, I had co-operated fully in bringing the inquiry to an early conclusion.

These statements of the respondent clearly show his disagreement and dissatisfaction with the appellant's action of demoting him and hence his disregard of the appellant's order to report for duty. BR Ghaiye, in his book '*Misconduct in Employment*' (2nd Ed), at p 306, said:

> 22 Whether an employee is required to obey orders if it is doubtful whether the orders are legal or not
>
> *It is generally held that the proper course for an employee is to obey the orders when it is given and protest about its illegality in separate proceedings.* The distinction is made on the basis that if it is allowed to a worker to judge about the legality of every order and to disobey it, if he thinks it is not legal, it would be impossible for the management to get the work done. (*Rashtriya Girni Kamgar Sangh v Genda Lal Mills Co* [1951] ICR 603 (IC); *Kalyanbhai Millji Bhai v New National Mills Co Ltd, Ahmedabad* [1957] ICR 1052 (IC); *BM Kastura v Swadeshi Mills Co Ltd* [1973] ICR (IC)). If an employee takes upon himself to disobey an order which he thinks not lawful or unreasonable, two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried out, he can do the work and take up the matter through the union. If he disobeys he must take the risk, if the court finds that the order was lawful and reasonable. (*RMMS, Bombay v Phoenix Mills Ltd* [1958] ICR 154 (IC)). When a worker refused to comply with the instructions of his superiors and his defence was that he wanted to verify whether the order was approved by the Manager. It amounted to insubordination and dismissal is justified. (*Cambodia Mills Ltd, Coimbatore v Industrial Tribunal, Madras* [1959] 11 LLJ 80 (Mad HC)). The above principle also applies to transfer orders. If an employee tries to disobey apparently lawful order on the ground of illegality it would be difficult for the management to maintain discipline and industrial peace. It is the duty of the employee to first obey the order and then challenge it. (*Abdul Latif v New Prakash Transport Co (Pvt) Ltd* [1974] ICR 1 (IC)). (Emphasis added.)

And as to absence of employee without permission, BR Ghaiye, at p 712 of the same book, said:

> No employee can claim as a matter of right leave of absence without permission and when there might not be any permission for the same. *Remaining absent without any permission is, therefore, gross violation of discipline* ... (Emphasis added.)

OP Malhotra in his book *The Law of Industrial Disputes* (2nd Ed), at pp 581–582, said:

> No employee can claim leave of absence as a matter of right, and *remaining absent without leave will itself constitute gross violation of discipline. Hence, continued absence from work without permission will constitute misconduct justifying the discharge of a workman from service.* (Emphasis added.)

In the context of the above-quoted authorities, we are of the view that the respondent's misconduct entitled the appellant, in the words of Lord Denning in *Clarke*, 'at common law to dismiss him'. And again, in the words of Lord Denning in *Clarke*, the appellant 'terminates the contract'

when he elects to dismiss the respondent. Bearing in mind what Dunston Ayadurai said in his book (quoted above), we hold the view that the termination by the appellant is a dismissal within the meaning of s 20(1) of the IRA. This also answers question (b) in para (1) above. And, as stated by the Court of Appeal, the respondent considered himself to be dismissed without just cause or excuse when his employment was terminated by the appellant. We agree. The termination letter is dated 6 June 1989. In the circumstances, time, under s 20(1) of the IRA, has to begin to run from 6 June 1989. Consequently the representation was made within time. This is also the answer to question (a) in para (1).

Having answered both the questions referred to us in this appeal, it now remains for us to consider the issue of whether the dismissal was with just cause or excuse (*Dr A Dutt*). The Industrial Court (IC) in its award had found that:

(a) the respondent had been summarily terminated for the misconduct of failing to report for duty to a demoted position as decided by the appellant;

(b) the appellant did not conduct any disciplinary proceedings as regards that misconduct of the respondent;

(c) the respondent was not asked to explain as to why he had failed to report for duty in compliance with the appellant's decision;

(d) the respondent was not given the right to be heard;

(e) the appellant had failed to make an inquiry before terminating the service of the respondent;

(f) the appellant had not called Dato' Mak Kok, the managing director of the appellant to justify the downgrading of the respondent;

(g) the appellant had not called the Chairman of the panel of inquiry and produce the findings of the panel, to convince the IC that the respondent had been properly downgraded and therefore the respondent has no justification in refusing to comply with the appellant's order to report for duty.

The learned High Court judge had on the other hand formed the view that the appellant's failure to conduct an inquiry into the misconduct of the respondent in not reporting for work is not fatal. At pp 29–30 of his judgment, the learned High Court judge said:

> ... there would be no additional information which would be gathered from the inquiry and the decision would have been the same, as the misconduct of the respondent is clear and not unambiguous. Furthermore, had an enquiry been held the respondent would have raised the issue of demotion, and this would not be the proper forum for the respondent to do so, considering that the proper forum under the law to raise such issue and to lodge his complaint, would be to the Director-General pursuant to s 20(1) of the Industrial Relations Act 1967. The respondent had adopted an attitude of indifference. Would not the action of the Employer in such circumstances be justified? Yes, it would, as otherwise all employees will stay away from work to win their demand whether valid or invalid, and yet tie the hands of the Employer from taking any action without being accused of having dismissed the employee from his employment.

We agree with the learned High Court judge; more so when considered in the light of the authorities referred to in para 8 above. There is nothing in its award that can indicate its awareness of those authorities — in particular the excerpts from BR Ghaiye's *Misconduct in Employment* and OP Malhotra's *The Law of Industrial Disputes*. In this sense, the IC had committed an error of law. It is also obvious that, in the circumstances, the findings of IC enlisted above fly against law, logic and reason. Mohamed Azmi SCJ, in *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18, at p 24 said:

> ... In other words, *if there is an error of law* on which the award of the Industrial Court is founded, *such error* whether of interpretation or otherwise *must necessarily be without jurisdiction or in excess of jurisdiction.* Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing 'to do something in the course of the inquiry which is of such a nature that its decision is a nullity' as referred to by Lord Reid at p 171 in *Anisminic*'s case, or the court 'having asked themselves the wrong question' as referred to Lord Diplock at p 187 in *Re Racal Communications Ltd.* (Emphasis added.)

In the case of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Edgar Joseph Jr FCJ, at p 187 of the report, said:

> But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for *process*, but also for *substance.*
>
> In this context it is useful to note how Lord Diplock defined the *three* grounds of review, to wit: (i) *illegality*; (ii) *irrationality*; and (iii) *procedural impropriety.* This is how he put it:
>
> > 'By "illegality" as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By "irrationality" I mean what can by now be succinctly referred to a "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to *a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. "*Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.*' (Emphasis added.)

At p 191 of the report, the learned judge continued thus:

> According to *Halsbury* (4th Ed) Vol 37 para 567, the process of judicial review is that: '... by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.'

And at p 196, the learned judge said:

> There are also Indian Supreme Court authorities which strongly support the proposition that the power of the courts there, in the field of public law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. (See for example, *State of Madhya Pradesh v Bhailal Bhai* AIR 1964 SC 1006; *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81; *Baldeo Prasad v Commissioner Jhansi Division* (1967) 63 ITR 55; *Hindustan Steel Ltd Rourkela v Roy AK* AIR 1970 SC 1401, at p 1407; *Variety Emporium v Mohd Ibrahim* AIR 1985 SC 207 at p 210).

Abdoolcader SCJ, in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, at p 206 said:

> I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 where in dealing with the question of unreasonableness I alluded (at pp 129–130) to Lord Diplock's exegesis in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 (at p 821) in regard to *decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them* and it would not perhaps be amiss to refer in this context to Dunn LJ's assertion in *Regina v Secretary of State for the Home Department, ex p Asif Mahmood Khan* [1984] 1 WLR 1337 (at p 1352) that: '*The categories of unreasonableness are not closed ...*' Mason J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299 (at p 310) that it might be possible to challenge a decision which has 'failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable' ... (Emphasis added.)

In the light of the above-quoted excerpts from *Enesty*, *R Rama Chandran* and *Malayan Banking*, the decision of the IC, without its consideration of the above-quoted excerpts from BR Ghaiye's and OP Malhotra's books in particular, in the words of Abdoolcader SCJ in *Malayan Banking*, is 'so devoid of any plausible justification that no reasonable body of persons could have reached them'. As such we are left with no alternative except to confirm the orders made by the High Court judge. The appeal is hereby allowed with costs. Deposit to be refunded to the appellant.

Appeal allowed.

Reported by Lim Lee Na